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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Carriage of the Transmissions)
of Digital Television Broadcast Stations) CS Docket No. 98-120
)
Amendment to Part 76)
of the Commission's Rules)

REPLY COMMENTS OF
DISCOVERY COMMUNICATIONS, INC.

Wesley R. Heppler
Steven J. Horvitz
James W. Tomlinson
COLE, RAYWID & BRAVERMAN, L.L.P.
1919 Pennsylvania Ave., N.W.
Suite 200
Washington, D.C. 20006
(202) 659-9750

Its Attorneys

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SUMMARY

Discovery Communications, Inc. ("DCI"), one of the nation's premier cable programmers, strongly opposes dual digital/analog must carry.

Certain broadcasters (led by NAB) assert in their Comments that must carry **automatically** extends to all DTV signals that commence operation during the current transition period. NAB's interpretation is off by 180 degrees. The statute does not bestow dual digital/analog must carry rights, and the exercise of such rights would dramatically increase the must carry burden. It is inconceivable that Congress intended to automatically double the burden on the cable industry without doing so explicitly. Rather, the statute, legislative history and common sense suggest that digital must carry applies only **after** the DTV transition has been completed.

NAB and other broadcasters assert that *Turner II* controls the outcome of any inquiry into the constitutionality of digital must carry. But digital must carry rules would be an entirely new, and vastly more burdensome, infringement of First Amendment rights. The proffered justification for digital must carry — facilitating the DTV transition — is not likely to be deemed a "substantial governmental interest." Moreover, the Commission has no factual record upon which it can justify dual must carry rules. An extension of the existing must carry rules to encompass digital signals would be particularly suspect in light of Comments submitted by leading DTV equipment manufacturers confirming that A/B switches and off-air reception will be a viable delivery mechanism for DTV.

NAB wrongly contends that the entire future of digital television hinges on must carry. For the foreseeable future, the limited penetration of HDTV sets will be the main

factor restraining the digital transition. Cable systems will not be digital "gatekeepers," and digital must carry is anything but "essential" to DTV. Indeed, digital must carry would likely *reduce* the amount of HDTV programming available to consumers from cable programmers. In any event, digital must carry addresses a potential problem that may or may not occur until 2002, when most DTV broadcasting will begin. As such, government intervention is inappropriate and unnecessary at this time.

NAB argues that the burden of digital must carry would be small because cable system upgrades will "easily" accommodate new DTV signals. However, this analysis does not necessarily justify government favoritism for one particular use of this upgraded capacity. It also ignores the adverse incentives that digital must carry would create for cable system upgrades, and the likelihood that many upgrades would never take place if new capacity must be set aside for DTV signals. The Commission must also consider the other beneficial uses for expanded cable capacity, such as new cable programming services, high-speed Internet access, and competitive telephony services.

For these reasons, DCI urges the Commission to forbear from imposing any digital must carry obligations during the transition period.

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Discovery Communications, Inc. ("DCI" or "the Company") hereby files these Reply Comments in the above-referenced proceeding. DCI's initial comments ("Comments") set forth key constitutional, statutory, and public policy considerations compelling a denial of digital must carry during the current "transition" period. The Comments submitted by certain broadcast interests advance a contrary position. Anxious to secure the obvious business advantages inherent to guaranteed cable carriage, these broadcasters (led by the National Association of Broadcasters (the "NAB")) take a flawed approach to the issue – simplistically insisting that must carry automatically extends to digital signals during the transition period. They largely ignore the fact that such a dramatic extension of must carry requirements would be at odds with the letter and spirit of the must carry statute and its already precarious constitutional justification. For the reasons set forth in its Comments and for the additional reasons discussed herein, DCI urges the Commission to forbear from imposing any digital must carry obligations during the transition period.

I. THE COMMUNICATIONS ACT DOES NOT REQUIRE CABLE OPERATORS TO CARRY DIGITAL BROADCAST SIGNALS DURING THE TRANSITION PERIOD

A. Additional Must Carry Burdens Should Not Be Cavalierly Imposed

NAB and other broadcasters contend that the Commission has no discretion regarding digital must carry — it must immediately confer must carry rights upon each and every DTV signal.¹ NAB contends that the "clear language of the must carry statute provisions of Section 614 of the Communications Act apply without distinction or exclusion to the new DTV signals."² NAB argues that if Congress had intended to exclude DTV signals from must carry during the transition period, it would have done so expressly and unequivocally. NAB's expansive interpretation of the must carry statute is off by 180 degrees. Where (as here) the statute does not specifically bestow must carry rights, and where (as here) exercise of such rights would markedly increase the existing must carry burden, the Commission must, consistent with both statutory, constitutional, and public policy considerations, resist entreaties to expansively impose new carriage obligations.

The first problem with NAB's analysis is that it runs roughshod over the only reference to digital broadcast signals appearing in the 1992 Cable Act. This solitary reference concerns the initiation of a Commission proceeding to consider modifications to the signal carriage requirements for broadcast signals "which have been changed to conform with

¹ NAB's analysis is in stark contrast to the Commission's tentative conclusion that it has "[b]road authority to define the scope of a cable operator's carriage requirements during the period of change from analog to digital broadcasting." NPRM at ¶ 13.

² NAB Comments at 3.

[digital broadcast] standards."³ As explained in DCI's Comments, this language strongly suggests that must carry rights for digital signals should apply only **after** the "change" from analog to digital has been completed and each broadcaster's digital transmission has entirely replaced its analog precursor.

Even if the Commission were to conclude that this particular statutory reference does not absolutely preclude the imposition of digital must carry during the current transition period, it surely does not compel that imposition. Given the magnitude of this issue, and the careful balancing and detail otherwise evident in the must carry statute, it is telling that Congress failed to include a provision specifically mandating digital must carry during the transition period. DCI respectfully submits that Congress' silence on this issue must be construed against dramatically expanding must carry obligations.

NAB's simplistic analysis — that digital broadcasts are "signals" and, therefore, automatically entitled to mandatory carriage, regardless of the "overlap" with existing analog signal carriage — is singularly unpersuasive. It presumes a cavalier attitude on the part of Congress towards the must carry burden that is irreconcilable with the cautious approach Congress actually pursued. Imposing digital must carry during the transition period unquestionably represents a dramatic addition to the existing must carry regime. Notwithstanding NAB's claim, it is not credible that Congress expected the Commission to impose this additional carriage burden on cable operators without providing explicit statutory

³ 47 U.S.C. § 534(b)(4)(B). It should be noted that in comments filed by the Association of Local Television Stations, Inc. ("ALTV"), ALTV disingenuously truncates the portion of the Section 614(b)(4)(B) that refers to stations "which have been changed to conform to [digital broadcast] standards." ALTV Comments at 8. ALTV's apparent desire to wish away this critical phrase speaks volumes.

instructions to this effect. As NCTA noted in its Comments, "Congress knows how to provide express authority to the Commission when it means to do so."⁴ NCTA correctly observed that it is inconceivable that Congress would have intended to **double** the must carry burden imposed on the cable industry without doing so explicitly.⁵

**B. The Statutory Provisions Are Irreconcilable With The
Imposition of Dual Digital/Analog Must Carry**

NAB's position is even more tenuous in light of other provisions of the 1992 must carry statute, which clearly reflect a Congressional desire to minimize the burdens associated with must carry where its use would not directly enhance content diversity. These provisions reveal an obvious Congressional interest in limiting the must carry burden, and they do so in a manner that is inconsistent with the simultaneous operation of digital and analog must carry.

Section 614(b)(5), for example, provides that a "cable operator shall not be required to carry the signal of any local television station that **substantially duplicates** the signal of another local commercial television station."⁶ This provision reflects a clear intent to avoid redundant must carry obligations. As NCTA noted in its Comments, "advanced television" signals were expected to be "simulcast" services when must carry was devised in 1992.⁷ Such simulcasting is now expressly required by the Commission during the latter

⁴ NCTA Comments at 9.

⁵ *Id.*

⁶ 47 U.S.C. § 534(b)(5) (emphasis added).

⁷ NCTA Comments at 12-13, n. 17.

portion of the transition period.⁸ It is clear that the "substantial duplication" exemption included in the governing statute is at odds with the dual imposition of digital and analog must carry sought by NAB.

NAB tries to avoid this problem by offering a cramped and contorted construction of the "substantial duplication" exemption. But NAB lacks any basis for its argument that this exemption does not apply in cases where the duplicating signals are distributed via different transmission technologies. If that were truly Congress' intent, one certainly would have expected Congress to have articulated that in the statute itself, particularly when Congress otherwise provided considerable detail regarding the definitional parameters of "substantial duplication." Again, this silence is telling. Congress did not bother modifying the "simultaneous duplication" rule to address simultaneous digital and analog transmissions, because it never envisioned this "double-dose" of must carry.

The statutory exemption for "duplicate network" stations found in Section 614(b)(5) reflects a similar weakness in NAB's must carry analysis. The statute plainly states that no cable operator shall be required to "carry the signals of more than one local commercial station affiliated with a particular broadcast network."⁹ NAB attempts to avoid the plain meaning and obvious intent of this provision by parsing the language and contending that the exemption does not apply when the two signals (one analog, one digital) come from the same licensee. Not only is the argument inherently illogical, but its tortured

⁸ *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fifth Report and Order*, 12 FCC Rcd. 12809, 12832 (1997).

⁹ 47 U.S.C. § 534(b)(5).

path highlights the underlying weakness in NAB's premise. If Congress truly expected simultaneous application of digital and analog must carry, surely it would have dealt more directly with the relationship between dual must carry and the "duplicate network" exemption, rather than leaving it to the Commission to avoid the exemption based on the tortured statutory analysis advanced by NAB.

These two must carry exemptions, along with several other limits included in the must carry regime, demonstrate a clear Congressional concern with overburdening cable operators, cable programmers, and cable customers with "redundant" broadcast carriage demands. In this context, the notion that Congress blithely imposed an automatic extension of the must carry regime to encompass **both** digital and analog carriage during the current transition period, without bothering to set any operational parameters on this dual carriage obligation, is utterly implausible.¹⁰ The contention is particularly suspect, because the vast majority of households will lack the television equipment necessary to view HDTV programming during the transition period. Under the circumstances, any silence or ambiguity in the statute must be construed against a dramatic expansion in must carry obligations.

In short, NAB's interpretation of the analog must carry statute is flat wrong — the Commission is not compelled to automatically grant must carry privileges to thousands of digital broadcast signals during the transition period. In fact, statutory constraints preclude the Commission from promulgating digital must carry rules. Section 624(f) of the Communications Act prohibits the Commission from enacting digital must carry requirements

¹⁰ Significantly, Rep. Dingell, Chairman of the House Commerce Committee at the time the 1992 must carry statute was adopted, recently announced his opposition to dual must carry. *See CableFax* (Nov. 11, 1998).

during the transition period absent express authority from Congress.¹¹ No such authority exists. Section 624(b)(4)(B) only directs the Commission to initiate a proceeding to establish "any changes in the signal carriage requirements" of cable systems to ensure carriage of broadcast signals "which have been changed to conform" with the new DTV standards. In short, the statute and common sense persuasively suggest that digital must carry applies only **after** the change from analog to digital has been completed.

II. THE LEGISLATIVE HISTORY IS INCONSISTENT WITH DUAL DIGITAL AND ANALOG MUST CARRY

A. The 1992 Legislative History

The legislative history of the Communications Act provides further evidence that Congress did not intend to grant dual digital and analog must carry rights. The legislative record is, in fact, conspicuously silent on this issue. This silence is in sharp contrast to the extensive discussion in the legislative record regarding First Amendment concerns. Under these circumstances, the requested expansion of must carry defies basic canons of statutory construction. As NCTA explained:

[t]he legislative history [of the 1992 Cable Act shows] a heightened sensitivity to the First Amendment vulnerability of must carry requirements and an effort by Congress to limit the scope and burden of the rules in order to survive constitutional challenges. Given these concerns, it is inconceivable that Congress would have been inclined to authorize a doubling of broadcasters' must carry entitlements during an open-ended transition period.¹²

¹¹ 47 U.S.C. § 544(f)(1).

¹² NCTA Comments at 8-9.

B. Subsequent Legislative History

Confronted with a dearth of support from the 1992 period, NAB focusses on subsequent legislative history to support its broad interpretation of the 1992 must carry statute. Its reliance on this legislative history is misplaced.

Although the very limited legislative material relied on by NAB does not directly preclude dual digital and analog must carry, its failure to clearly provide for dual must carry is compelling evidence against the Commission doing so in this proceeding. NAB first refers to the Conference Report on the 1996 Telecommunications Act. The Report simply states:

The conferees do not intend [the 1996 Act provisions] to confer must carry status on advanced television or other video services offered on designated frequencies. Under the 1992 Cable Act, that issue is to be the subject of a Commission proceeding under section 614(b)(4)(B) of the Communications Act.¹³

NAB proudly declares that this brief passage "reinforces the point that the 1996 Act was not intended to change the must carry status of digital signals generally."¹⁴ But NAB never explains how this passage "reinforces" its assertion that the Commission must automatically grant dual must carry rights. The discretionary language in the passage suggests quite the contrary.

NAB also cites the Balanced Budget Act of 1997,¹⁵ in which Congress addressed the transition to digital television and set conditions for the return of spectrum used

¹³ H. REP. NO. 104-458, at 161 (1996).

¹⁴ NAB Comments, Jenner & Block Statement at 8.

¹⁵ Pub. L. No. 105-33, 111 Stat. 251 (1997).

for analog television service. In that Act, Congress directed the Commission to allow stations to continue to offer analog service in markets where 15% or more of television households "do not subscribe to a multi-channel video programming distributor ["MVPD"] . . . that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such market."¹⁶ NAB wrongly implies that the provision assumes the existence of digital must carry during the transition period. In fact, the provision makes no such assumption. It leaves open the marketplace possibility that MVPDs (including cable systems) may or may not be carrying all available digital broadcast signals during the transition period, and it leaves entirely unanswered whether any such carriage would be voluntary or compelled by must carry requirements.

III. DUAL DIGITAL/ANALOG MUST CARRY IS UNCONSTITUTIONAL

A. Dual Must Carry Requires A 'Fresh Look'

NAB asserts that "there is no doubt that mandatory carriage of both analog and digital signals during the transition would be constitutional."¹⁷ More specifically, NAB insists that because digital must carry is a component of the existing statutory scheme, the Supreme Court's decision in *Turner II*¹⁸ is "fully applicable to DTV must carry."¹⁹ Similarly, ALTV states that "those who challenge application of the must carry rules to DTV on [First Amendment] grounds must distinguish that application of the rules in some material way from

¹⁶ 47 U.S.C. § 309(j)(14)(B)(iii).

¹⁷ NAB Comments at 42.

¹⁸ *Turner Broadcasting System, Inc. v. FCC*, 580 U.S. 180; 117 S. Ct. 1174 (1997) ("*Turner II*").

¹⁹ NAB Comments at 42.

their application to analog signals."²⁰ There is, of course, no question that the simultaneous application of digital and analog must carry would be "materially" different from the historic application of analog must carry alone, and that the prior judicial review focused exclusively on an analog universe. The obvious desire on the part of NAB and ALTV to avoid a "fresh look" at the constitutionality of a **dual** must carry regime reflects recognition that the new must carry regime they seek to compose would not withstand judicial scrutiny.

As DCI explained in its Comments, the imposition of an entirely new set of must carry requirements would represent an entirely new infringement of cable networks' and cable operators' First Amendment rights, and would be vastly more burdensome than the analog must carry statute upheld by the Supreme Court by the narrowest of margins. Thus, despite NAB's and ALTV's wildly optimistic predictions about the constitutionality of digital must carry, the Commission must carefully consider the serious constitutional considerations at issue in this proceeding.

As Chairman Kennard recently noted:

[*Turner*] was not an easy fight. . . . Now, if the broadcast industry comes to the agency and says: "We want not one, but two, channels on the basic cable tier," my sensibilities as a lawyer tell me, "Well, you've got to make the case for that." And that is going to be a fairly difficult burden. If you're telling cable systems, including those that are capacity constrained, to give two six megahertz channels to every local broadcast signal, I have difficulty understanding how we can make that case in the Supreme Court and we know the cable industry is going to take this all the way, as they always have with must carry.²¹

²⁰ ALTV Comments at 13.

²¹ *Steady as She Goes -- FCC Chairman Bill Kennard and the Cool Approach to DTV*, Broadcasting and Cable, Nov. 16, 1998, S10.

Chairman Kennard correctly recognizes that *Turner II* does not control and that digital must carry rules imposed on top of analog must carry would require an entirely new constitutional battle — one in which the government's position would be untenable.

B. Dual Must Carry Is Not Constitutionally Justified

The Commission did not even attempt in its NPRM to justify digital must carry on the grounds originally used to justify analog must carry. Rather, it identified alternative "statutory goals" upon which to justify the creation of dual digital/analog must carry rules.²² These statutory goals can be condensed into one overarching objective: facilitating the transition to digital broadcasting. It is doubtful, however, that the Commission's desire to facilitate a transition to digital broadcasting would be deemed a "substantial governmental interest" by a reviewing court. The transmission conversion may serve legitimate technical and spectrum management objectives, but it is hardly imperative for the continuation of free over-the-air television as we know it today. As Justice O'Connor explained in *Turner II*: "the must carry provisions have never been justified as a means of enhancing broadcast television."²³

²² Specifically, these include:

- (1) the successful introduction of digital broadcast television and the subsequent recovery of the vacated broadcast spectrum (NPRM at ¶ 1);
- (2) retention of the strength and competitiveness of broadcast television (*Id.*);
- (3) the desire to "provide assurance [to broadcasters] that investment in digital technology and programming will be fully realized" (NPRM at ¶ 41); and
- (4) the desire to assure digital broadcasters that they will reach the audience they are licensed to serve. *Id.*

²³ *Turner II*, 117 S. Ct. at 1214.

While the Commission appears prepared to look beyond the original constitutional justification for analog must carry, NAB (recognizing the fatal risk in doing so) is not. NAB instead asserts that the predominant federal justification for must carry requirements — "protecting noncable households from loss of **regular** television broadcasting service due to competition from cable systems"²⁴ — is "fully applicable" to digital must carry. But the loss of **regular** television broadcasting service is not at issue in this proceeding and cannot possibly justify digital must carry.

As DCI stressed in its Comments, while it may have been (barely) constitutionally permissible for Congress to pass a statute imposing must carry obligations for analog broadcast signals, it is an entirely different matter for the Commission to impose additional must carry requirements for digital broadcast signals by regulatory fiat for far less compelling regulatory purposes. Simply put, vastly different legal and factual questions apply in the context of digital must carry, of which any one will likely tip the precarious constitutional balance.

For example, there can be no doubt that the Supreme Court carefully examined the real, as opposed to theoretical (*i.e.*, one-third capacity), burden that must carry imposes on cable operators.²⁵ NAB inexplicably contends that the impact on an entirely new and redundant set of must carry rights afforded to broadcasters will be "small."²⁶ NAB's analysis

²⁴ *Turner II*, 117 S. Ct. at 1186 (citing *Turner I*, 114 S. Ct. at 2470) (emphasis added).

²⁵ *See Turner II*, 117 S. Ct. at 1198.

²⁶ NAB Comments at 24. One cannot help but wonder whether the broadcast industry would consider the impact of a rule requiring one-third of its airtime to be dedicated to public interest to be "small."

conveniently ignores the critical fact that the vast majority of analog broadcast signals were carried long before broadcasters had any must carry rights — a fact that was identified and relied upon by the *Turner II* Court.²⁷ Of course, all DTV signals will be entirely new. As such, any imposition of digital must carry during the transition period will result in a corresponding reduction in cable channel capacity available for other uses. NAB's protestations aside, there can be little doubt that the impact of new digital must carry obligations, on top of existing analog must carry rules, would create an enormous new burden on the cable industry — far exceeding the impact of the analog must carry rules that barely survived constitutional scrutiny.

Another key constitutional distinction between analog-only and dual digital/analog must carry rules is that, unlike analog-only must carry, the Commission has no record upon which it can reasonably justify dual must carry rules. The analog must carry statute was backed by extensive Congressional findings and explicit directives contained in Section 614. Neither is present in the context of dual digital/analog must carry. Nor is there any historical basis to assume that digital must carry is needed during the transition. As the D.C. Circuit stated in *Quincy Cable*, "the mere abstract assertion of a substantial governmental interest, standing alone, is insufficient to justify the subordination of First Amendment freedoms."²⁸ In short, the record from the *Turner* cases is inapplicable and makes little sense if new digital must carry entitlements are somehow grafted onto the existing analog must carry regime.

²⁷ *Turner II*, 117 S. Ct. at 1198-1199.

²⁸ *Quincy Cable TV, Inc. v. FCC*, 768 F. 2d 1434, 1454 (D.C. Cir. 1985).

IV. A/B SWITCHES AND OFF-AIR ANTENNAS ARE A VIABLE OPTION FOR DELIVERY OF DTV BROADCAST SIGNALS TO CONSUMERS

DCI emphasized in its Comments that digital must carry is unnecessary because consumer use of a remote control A/B switch and an off-air antenna will not pose a significant practical problem in the digital era.²⁹ Comments submitted by several consumer electronics manufacturers confirm that off-air reception will be a viable delivery mechanism for digital broadcast signals. For example, Philips Electronics, a leading manufacturer of digital television equipment, explains:

[c]oncerns about over-the-air reception of DTV signals are unfounded. . . . Philips is confident that its DTV receivers will be uniformly capable of receiving and displaying off-air DTV signals with little or no difficulty or confusion being imposed upon the consumer, and will devote substantial resources to ensuring that consumers purchasing its DTV receivers are entirely satisfied with their receiver's performance.³⁰

Philips goes on to state that "while many consumers will be able to use the same antenna they currently use for NTSC television . . . in the early phase of the transition, consumers purchasing a Philips DTV receiver will also receive an antenna *at no additional charge*."³¹ Thus, while ALTV contends (without basis) that it is "unrealistic" to think that "consumers would be willing to bear an additional expense to install a rooftop antenna and an A/B switch to access [DTV] stations,"³² at least one major equipment manufacturer has already devised a marketplace solution.

²⁹ DCI Comments at 25-30.

³⁰ Philips Comments at 14-15.

³¹ Philips Comments at 18 (emphasis added).

³² ALTV Comments at 79.

Philips also confirms the Commission's conclusion that digital television sets will incorporate A/B switches that operate by remote control.³³ Philips states that A/B switches "will be a standard feature in all of Philips' DTV receivers, usually located on the receiver's remote control unit."³⁴ DTV equipment manufacturer Thomson Consumer Electronics similarly confirms that it is "confident that its DTV receivers will be uniformly capable of receiving displaying off-air DTV signals" and that A/B switches will be a "standard feature in all of Thomson's DTV receivers, usually located on the receiver's remote control unit."³⁵ Even the Consumer Electronics Manufacturers Association ("CEMA") states that it, too, is "confident that DTV receivers will be capable of receiving and displaying off-the-air signals with excellent picture quality."³⁶ To aid this effort, CEMA has developed a comprehensive antenna mapping guide that will be furnished to consumer electronics retailers across the country and will enable retailers to match consumers, based on their location, to the antenna best suited to their location.³⁷

Significantly, DirecTV, the nation's largest DBS provider, has repeatedly stated that it does not intend to offer local broadcast signals in its satellite transmission-delivered programming package and will instead rely on an A/B switch for DirecTV customers to gain

³³ NPRM at ¶ 88 ("a switch mechanism is now incorporated into many [analog] television receivers (as well as into videotape recorders and DBS receivers) and new digital television receivers may have multiple input possibilities fully selectable from remote control devices.").

³⁴ Philips Comments at 19.

³⁵ Thomson Comments at 23-24.

³⁶ CEMA Comments at 26.

³⁷ *Id.*; Philips Comments at 18.

access to local broadcast channels. At a recent conference heralding the "Dawn of Digital," the DirecTV representative stated that "DTV broadcasts, received on a companion over-the-air antenna to a DBS dish, will allow local stations to 'reconnect directly with their audience minus the cable gatekeeper.'"³⁸

DirecTV's "A/B switch" approach to DTV was recently echoed by cable MSO TCI. It has announced a program to assist cable subscribers who purchase DTV sets to optimize reception of digital broadcasts using off-air antennas. Under the program, a special team of technicians will provide free service calls and will assist customers in receiving the best DTV signal by tuning the antenna and by providing the subscriber with a free A/B switch if needed.³⁹

Not surprisingly, NAB's Comments say very little about the viability of A/B switches and off-air antennas as an option for the reception of DTV broadcasts. In the face of overwhelmingly contrary evidence, it asserts only that the Commission is somehow "bound" by a Congressional "finding" from 1992, which was based on studies that are now more than 12 years old. The Commission, however, is under no obligation to cast a blind eye towards the record in this proceeding and the dramatic technological developments that NAB would like it to ignore.

NAB further contends that "history has shown . . . that consumers with cable will only use cable for viewing over-the-air broadcasters."⁴⁰ History has also shown that

³⁸ Broadcasting & Cable, Nov. 23, 1998, p. 46.

³⁹ *No "Bottleneck": TCI Says Antennas Are Answers for Customers' DTV*, Communications Daily, Dec. 10, 1998, p. 3.

⁴⁰ NAB Comments at 11.

"early adapters," who everyone agrees will be the first purchasers of DTV sets, are not easily deterred, especially where, as here, off-air antennas and A/B switches are neither particularly complicated nor expensive. The reality is that early purchasers of digital television sets will spend thousands of dollars for the express purpose of receiving DTV telecasts. Common sense suggests that these subscribers will aggressively seek out whatever DTV programming is available — whether or not it is carried on cable.

Chairman Kennard recently acknowledged that A/B switches and off-air antennas present a viable alternative to compelled carriage of DTV signals. He stated, "Broadcasters do have an alternative delivery system to digital. It's an over-the-air technology. Cable is not their only gateway into America's homes."⁴¹ DCI (like other cable programmers), by contrast, is entirely dependent on cable systems and other MVPDs with limited channel capacity for distribution. Accordingly, DCI urges the Commission to take full account of the advancements in A/B switch and off-air antenna technology in this proceeding. These advancements provide a dispositive reason why digital must carry rules are both unnecessary and unconstitutional.

V. DUAL DIGITAL/ANALOG MUST CARRY WOULD NOT SERVE THE PUBLIC INTEREST

A. Digital Must Carry Is Not "Essential" To The Digital Transition

NAB asserts that the digital transformation is already marked with difficulty and uncertainty, and that broadcasters must have a government-created guarantee of cable carriage in order for DTV to succeed. It repeatedly calls for the Commission to give

⁴¹ *Steady as She Goes -- FCC Chairman Bill Kennard and the Cool Approach to DTV*, Broadcasting and Cable, Nov. 16, 1998, S11.

broadcasters "certainty" that they can reach cable subscribers, threatening that broadcasters otherwise may be reluctant to meet the Commission's digital build-out schedule.⁴² In other words, according to NAB, the entire future of the digital television rides on the back of digital must carry.⁴³ While independent broadcasters obviously would like to be insulated from the business risks inherent to the digital transition and would prefer the security of a government-imposed right to dual carriage, the Commission should give no weight to NAB's hyperbolic arguments.

For the foreseeable future, the limited availability and high cost of digital television sets will be the primary factor restraining consumers' reception of DTV signals — not carriage on cable. CEMA predicts that only 150,000 DTV sets will be sold by the end of 1999, or a penetration rate of only 0.15% of the 98 million U.S. television households.⁴⁴ A study released in early December by Forrester Research confirmed that the current cost of DTV sets, between \$5,000 and \$10,000, is simply too high for consumers.⁴⁵

⁴² See NAB Comments at 12-14.

⁴³ NAB, in its comments, states that its affiant, Mr. Pappas, "attests to the fact that his lenders would be 'extremely reluctant, if not absolutely opposed' to providing financing for construction [for DTV without digital must carry]." NAB Comments at 13. Actually, Mr. Pappas only attests to his "confidence" that lenders would react in this manner. NAB Comments, Appendix B, Declaration of Harry J. Pappas at 2. Mr. Pappas further admits that he has "not yet formally presented a proposal to our lenders for a financing commitment for DTV construction costs for any of our stations." *Id.* By "carefully" editing Mr. Pappas' declaration in its Comments, NAB suggests that lending commitments for DTV are entirely contingent on digital must carry. This is absurd. Industry-savvy lenders are surely aware that digital must carry is but one small component in the complex mix of issues surrounding the transition to DTV.

⁴⁴ Jim Cooper and Megan Larson, *Digital TV: A High-Def Breakthrough*, Mediaweek, Dec. 14, 1998.

⁴⁵ *Id.*

Moreover, while NAB would like the Commission to believe that the very future of digital television is entirely contingent upon broadcasters being granted automatic must carry rights, this is hardly the case. As discussed in Section IV above, with the ability of consumers to receive digital broadcasts via off-air antennas, cable carriage is but one small piece of the DTV transition puzzle. Cable systems will not be digital "gatekeepers" as NAB alleges.

The reality is that digital must carry is anything but "essential" to the transition to digital television. In fact, as DCI explained in its Comments, the imposition of digital must carry during the transition period would likely inhibit the development of HDTV programming by cable networks by consuming precious channel capacity. This would reduce the total amount of HDTV programming available and, thereby, reduce consumers' incentives to purchase DTV sets.⁴⁶ The real challenge facing the video programming industry in the transition to digital is the current lack of affordable and widely-available DTV sets. Digital must carry will do nothing to reduce or eliminate this problem, and would likely exacerbate it.

Finally, DCI notes that it is already investing millions of dollars in digital programming and is planning to launch its own HDTV network in the near future — with no government-created right to carriage on cable systems. There is no principled reason why

⁴⁶ Even NAB admits that the more digital programming that is available, the faster receivers will sell. NAB Comments at 16. However, NAB is working under the erroneous assumption that all digital programming must necessarily come from broadcasters. In fact, the best way to maximize HDTV programming is to have broadcasters rely primarily on their off-air spectrum allocation to deliver HDTV telecasts and have cable networks rely primarily on cable systems to deliver HDTV telecasts.

broadcasters should be excused from these same business risks. As Justice O'Connor explained in *Turner II*: "[m]ust-carry is intended not to guarantee the financial health of all broadcasters" ⁴⁷

B. Immediate Imposition Of Digital Must Carry Would Be Premature And Counterproductive

NAB argues that immediate must carry rules are necessary, and that these rules should mandate carriage "*as each DTV signal goes on air*." ⁴⁸ Despite NAB's and ALTV's protestations, there can be little doubt that Commission action would be grossly premature at this time and might well run counter to the goal of realizing the promise of DTV by impeding the development of HDTV cable programming.

The DTV transition schedule starts with the largest networks in the largest markets. Only network affiliates of the four largest broadcast networks in the top-ten market must commence DTV broadcasting by May 1, 1999, ⁴⁹ while "big-four" network affiliates in the top thirty markets must begin DTV broadcasting by November 1, 1999. ⁵⁰ All other

⁴⁷ *Turner II*, 117 S. Ct. at 1202.

⁴⁸ NAB Comments at 18 (emphasis in original); NAB Comments at 52 (NAB "urges the Commission to adopt as soon as possible must carry rules to ensure full and immediate cable carriage of DTV signals as they come on air during the DTV transition.").

ALTV even more emphatically echoes NAB's call for immediate enactment of digital must carry rules: "The FCC should move forward now! . . . If the FCC truly wants a timely deployment of free-over-the-air digital television, then it should enact must carry and retransmission consent rules today!" ALTV Comments at Executive Summary.

⁴⁹ *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd. 12809, 12840-41 (1997).

⁵⁰ *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd. 12809, 12841 (1997).

commercial stations — indeed, all but approximately 120 commercial stations — have until May 1, 2002 to construct DTV facilities. Non-commercial stations need not commence DTV broadcasts until May 1, 2003.⁵¹ As only 120 "big four" network-affiliated stations are obligated to proceed prior to 2002, there is no justification for immediate action by the Commission.

Cable operators have strong economic incentives to deliver digital programming in response to consumer demand, and all indications are that the first digital broadcast stations *will* obtain carriage on cable systems — through private negotiations, not by government fiat. Carriage agreements that provide for carriage of DTV broadcasts are now being negotiated, and in some cases finalized, between cable operators and broadcasters. In mid-December, Time Warner and CBS reached an agreement whereby Time Warner agreed to carry the digital signals of CBS's fourteen owned-and operated TV stations. The agreement also provides a framework by which Time Warner systems will carry the digital signals of CBS affiliates if the affiliates so desire.⁵² According to one industry press report: "[T]he digital carriage agreement struck last week between Time Warner Cable and CBS is likely to touch off similar deals that would give digital broadcasters the cable pipe they are seeking without relying on federal must-carry mandates."⁵³ The Time Warner-CBS agreement comes on top of reports from MediaOne that about half of its retransmission agreements

⁵¹ *Id.* at 12832.

⁵² See Donna Petrozzello and Glen Dickson, *TW to CBS: Will Carry*, Broadcasting & Cable, Dec. 14, 1998, p. 6 ("*Petrozzello Article*"); Monica Hogan and Leslie Ellis, *Time Warner, CBS Ink HD Deal*, Multichannel News, Dec. 14, 1998, p. 1.

⁵³ *Petrozzello Article* at 1.

already include digital carriage specifications.⁵⁴ According to other press reports, constructive negotiations are underway between broadcasters and other cable MSOs.

As for smaller market broadcasters, NAB appears to assume that Congress and Commission want as many stations as possible to be broadcasting in DTV as quickly as possible. While it is universally acknowledged that the 2006 target date set for return of the analog spectrum is an aggressive goal, there is no indication that Congress or the Commission desires a more aggressive DTV transition schedule for small market stations, as NAB seems to suggest. The Commission's DTV transition plan is both clear and sound: the top-10 major network affiliates will be the first digital broadcasters and would be followed shortly thereafter by top-30 major network affiliates. It is not until several years later — 2002 — that smaller market and other broadcasters must begin digital broadcasting. By that time, many, if not most, of the major questions about the DTV transition will have been answered. Moreover, affiliates of the WB, UPN and PAXNET networks will have had four more years to establish themselves among viewers and create brand loyalty — thereby enhancing their bargaining position in carriage negotiations with cable operators.

If digital broadcasting is truly as risky a proposition as NAB suggests, then it may be prudent for small stations to allow the larger broadcasters to lead the way and assume the most significant risks, as contemplated by the Commission's transition schedule. And by no means would it be prudent for the Commission to give artificial incentives to small market broadcasters to begin digital broadcasting ahead of the transition schedule by granting them immediate digital must carry rights.

⁵⁴ CableFax Daily, Oct. 7, 1998, p. 1.

In short, extending digital must carry during the transition period addresses a potential problem that may or may not occur for another four years. Given that digital television is in its very infancy, government intervention is especially inappropriate and unnecessary at this time.

C. Digital Must Carry Would Impose A Substantial Burden On Cable Systems And Cable Programmers

NAB argues that the burden of digital must carry would be "small (if not *de minimus*)."⁵⁵ NAB bases its assertion on a study conducted by Strategic Policy Research, Inc. ("SPR"), which concluded that cable systems have adequate capacity to carry new DTV signals scheduled to begin broadcasting,⁵⁶ and that cable system upgrades will "easily" accommodate new DTV signals as they begin broadcasting.⁵⁷ Finally, NAB suggests that it would accept a digital must carry regime limited to upgraded cable systems.⁵⁸ NAB, however, has completely ignored the adverse incentives that a digital must carry regime would create for cable system upgrades.

NAB's proposal would require the allocation of thousands of hypothetical cable channels (*i.e.* channels that have not yet been created by cable operators) to DTV broadcast

⁵⁵ NAB Comments at 24.

⁵⁶ In several important respects, the SPR study appears to be flawed. First, the study relies on data reported in the Television & Cable Factbook for channel capacity and unused capacity, but excludes 2,153 systems (or about 20% of the U.S. total) that do not report unused capacity. SPR Study at n. 30. Second, the SPR study relies on the total number of unused channels reported in the Factbook for all cable systems regardless of size, resulting in a skewed depiction of the number of channels available on systems located outside the top-10 DMAs.

⁵⁷ NAB Comments at 25-26.

⁵⁸ NAB Comments at 26.

signals — at the expense of cable networks or other new services. It is, of course, easy to be generous when allocating the property of another. But aside from the fundamental unfairness of granting additional carriage rights to broadcasters — on top of their existing analog and digital spectrum allocations and their existing analog must carry rights — NAB wrongly assumes that cable system upgrades are both inevitable and cost-free to cable operators. As DCI explained in its Comments:

Cable operators with upgraded systems must seek to maximize their "revenue per megahertz" to justify the upgrade costs. . . . Accordingly, if cable operators are forced to devote upgrade capacity to services (such as digital broadcasts) that will not drive consumer demand or markedly increase system revenue, they may refrain from making the upgrade altogether.⁵⁹

Thus, the Commission should not assume, as NAB apparently has, that cable system upgrades will eliminate the serious problem of a lack of available cable channel capacity and, on that erroneous basis, fashion a "compromise" phase-in proposal. Anticipated upgrades may never be built, or may be significantly delayed, if new capacity must be set aside for non-revenue-generating purposes, such as redundant digital broadcasts.

Perhaps more importantly, DTV broadcast signals are only one kind of service for which a cable operator can use additional system capacity. DCI and other cable programmers now actively compete for channel space, even on upgraded plant. In the NPRM, the Commission failed to consider, or even mention, the adverse impact of digital must carry rules on the launch and survival new programming networks. As a provider of both established, emerging, and new cable programming networks, DCI believes that the

⁵⁹ DCI Comments at 7.

Commission must resist the political temptation to minimize public outrage by protecting existing carriage, but giving digital broadcast channels automatic carriage priority over any additional non-broadcast services. DCI also urges the Commission to consider the exciting potential options for the use of expanded cable capacity outside traditional video programming. An increase in must carry demands to accommodate dual digital and analog broadcasts would limit the cable capacity available for high-speed Internet access and facilities-based competitive telephone services.

CONCLUSION

Just last week, DCI announced plans to invest up to \$350 million in its recently-launched Discovery Health Channel, with a goal to grow this network into a ubiquitous cable network that displays high quality health-related programming.

DCI is confident that the health-related programming offered on this network will provide enormous benefits to the nation's cable customers.

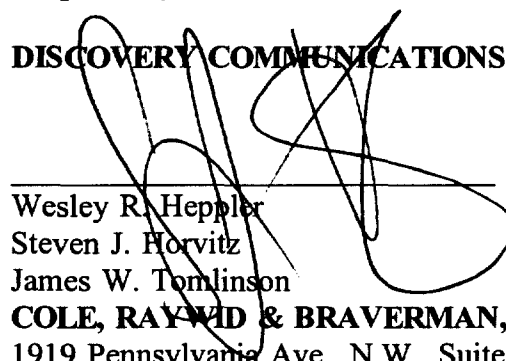
DCI (like any cable programmer) recognizes that it operates in a competitive arena and that success for Discovery Health Channel is not guaranteed. DCI is ready, willing, and eager to compete, but it is concerned that the legal playing field (which already slopes sharply in favor of broadcasters) may soon experience additional erosion in favor of broadcasters. DCI is mystified why these broadcasters, already armed with free digital and analog spectrum for "over-the-air" delivery and already guaranteed cable carriage for their

analog signal, merit additional favoritism during the transition period. As C-SPAN recently articulated, the requested expansion of must carry is "unfair, unconstitutional, and un-American."

Respectfully submitted,

DISCOVERY COMMUNICATIONS, INC.

By:



Wesley R. Hepler
Steven J. Horvitz
James W. Tomlinson
COLE, RAYMOND & BRAVERMAN, L.L.P.
1919 Pennsylvania Ave., N.W., Suite 200
Washington, D.C. 20006
(202) 659-9750

Its Attorneys

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